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No. 97-1164

(4)

In The

Supreme Court of the United States

October Term, 1997

BARBARA GLEASON, As Executrix of the Estate of William C. Gleason, Deceased, and Individually,

Petitioner,

vs.

FRANK R. NOYES, M.D.; CINCINNATI SPORTSMEDICINE & ORTHOPAEDIC CENTER, INC.; JEFF WINHOLDT, M.D.; DEACONESS HOSPITAL,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

BRIEF IN OPPOSITION FOR RESPONDENTS JEFF WINHOLDT, M.D.; FRANK R. NOYES, M.D. AND CINCINNATI SPORTS MEDICINE & ORTHOPAEDIC CENTER, INC.

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STATEMENT PURSUANT TO RULE 29.6

Respondent Cincinnati, Sportsmedicine & Orthopaedic Center, Inc., has no parent company and no nonwholly owned subsidiaries.

INTRODUCTION

This case presents no compelling basis for certiorari. The Petitions argument disposed of by the Sixth Circuit is not in conflict with the decision of another United States Court of Appeal; nor has the decision of the Sixth Circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's supervisory power nor does the petition present a constitutional question.

Simply stated, petitioner's argument turns on the narrow and unique facts of the case which are only of interest to the parties and fact canvassing is not a task to be served by a grant of a writ of certiorari.

STATEMENT OF THE CASE

Petitioner's decedent, a Michigan resident, had developed advanced arthritis in his left knee and came to the Cincinnati area in August 1992 to be evaluated by Dr. Frank Noyes, an orthopaedic surgeon. Mr. Gleason's knee condition continued to worsen to the point where he needed a knee joint replacement which was performed by Dr. Noyes in November 1991.

Prior to the surgery, because Mr. Gleason had a history of deep vein thrombosis and pulmonary embolism, Dr. Noyes brought in two consultants to evaluate the patient's medical factors relating to blood clotting, to form a plan to minimize a risk of a recurrence of deep vein thrombosis and pulmonary embolism and to recommend an appropriate anesthetic during the knee surgery.

Following the knee surgery, Mr. Gleason developed scar tissue in the knee joint which was removed by a second surgical procedure. By February 1992 Mr. Gleason began to lose satisfactory motion in his knee and he was admitted to the hospital for a third time for a knee manipulation under a continuous epidural anesthetic. The purpose of the epidural was to provide pain relief during the procedure itself and thereafter. Two days following the

manipulation, while he was still in the hospital, Mr. Gleason passed away as a result of fresh blood clots in his lungs.

Petitioners instituted a wrongful death medical negligence case against respondents Frank Noyes, M.D.; Jeff Winholdt, M.D., the anesthesiologist; Deaconess Hospital, the claim against the latter being that a physical therapist employed by the hospital failed to detect signs and symptoms consistent with deep vein thrombosis and that the hospital had unlawfully and without the consent of the widow, harvested certain portions of Mr. Gleason's body for transplant purposes.

After a four week trial a nine member jury unanimously granted judgment in favor of all three respondents. Petitioner then filed a motion for new trial/JNOV which was denied.

Petitioner then appealed to the United States Court of Appeals for the Sixth Circuit which affirmed the jury verdict and the trial court's denial of petitioner's motion for a new trial.

A petition for a rehearing *en banc* was denied.

REASONS FOR DENYING THE WRIT

I. During the course of the trial it was brought to the court's attention that Dr. Noyes and two of the experts that testified on this behalf were provided with liability insurance coverage by the same insurer. In reliance upon the Ohio Supreme Court of *Ede v. Atrium South OB/GYN, Inc.*, 71 Ohio St. 3d 124 (1994) petitioner sought to offer evidence of a commonality of insurance interests in an effort to demonstrate bias. The magistrate judge precluded such evidence being offered for the reason that it was far to prejudicial.

In *Ede*, the trial court in construing Ohio Evidence Rule 403, in substance held that evidence of insurance was so potentially prejudicial as to outweigh its probative value. However, the Ohio Supreme Court held that the trial court abused its discretion and in

applying Ohio Evidence Rule 411 held that evidence of a commonality of insurance interest between a defendant and an expert witness was sufficiently probative of the experts bias as to outweigh any potential prejudice evidence of insurance may cause.

Fed. R. Evid. 1101, with a few exceptions not herein inapplicable, in substance provides that the Fed. R. Evid. apply to the United States District Court in civil actions and proceedings.

In diversity cases, the states substantive law applies, however, in matters of procedure such as admissibility of evidence, the Fed. R. Evid. apply. *Granada Steel Indus. Inc. v. Alabama Oxygen, Inc.*, 695 F.2d 883 (6th Cir. 1983); *McInnis v. AMF, Inc.*, 765 F.2d 240 (1st Cir. 1985); *Raimer v. United States*, 396 U.S. 965.

Ohio Evidence Rule and Federal Evidence Rule 403 and 411 are virtually identical. The magistrate judge was not bound by Ohio's interpretation of its Rules of Evidence and did not abuse its discretion by precluding evidence of insurance as being so potentially prejudicial as to outweigh its probative value. *Finch v. Monumental Life Ins. Co.*, 820 F.2d 1426 (6th Cir. 1987).

The Sixth Circuit in its unpublished opinion did not address this perceived assignment of error. It combined six assignments of error where it was alleged that the magistrate judge improperly admitted or excluded evidence and held that while the magistrate judge erred with regard to at least three of the challenged errs, even taken collectively, these errs did not prejudice petitioners case and that it could not be said that correct rulings would have in any respect altered the jury's verdict.

II. During final argument several comments were made by defense counsel which the Sixth Circuit held to be improper but which were not objected to by petitioner's counsel. Following the verdict, petitioner filed a motion for a new trial/judgment notwithstanding the verdict, arguing that the comments by defense counsel in closing argument were prejudicial. In overruling the motion the magistrate judge held that petitioner's counsel failed to object to the improper comments, that curative instructions were

given to the jury, that petitioner's counsel engaged in similar conduct and that substantial evidence was presented by respondents to support the verdict.

In affirming, the Sixth Circuit held that the trial court's continuing curative instructions and the petitioner's failure to object to most of the improper comments by defense counsel mitigated the effect of said comments.

In citing *Twatchman v. Connelly*, 106 F.2d 501, 509 (6th Cir. 1939), the court properly held that the trial court is clothed with a great deal of discretion in determining whether an objectionable question is so prejudicial as to require a retrial and is in the best position to measure the affect of an improper question on the jury than a reviewing court which can only look at the cold record. The general rule is that decisions of a trial judge based on the assessment of the prejudicial impact of allegedly improper argument of counsel is entitled to great deference. *Arizona v. Washington*, 434 U.S. 497, 514 (1978).

The court further stated that petitioner's failure to object precludes review under any standard other than plain error even if the error was "clear and obvious under current law". Petitioner's failure to object imposes upon him the burden of demonstrating that the improper argument prejudicially affected the outcome of the trial resulting in a miscarriage of justice. In holding that the petitioner had not sustained her burden, the magistrate judge as well as the Sixth Circuit held that the verdict was well supported by the evidence and that the jury's verdict should not be set aside and a new trial ordered.

III. While petitioner claims that Fed. R. Civ. P. 48 violates the due process clause of the Fourteenth Amendment to the United States Constitution, absolutely no authority is cited nor does the petitioner set forth any cogent or logical argument to sustain her argument.

Rule 48 of the Fed. R. Civ. P. provides that the court shall seat a jury of not fewer than six and not more than 12 and all

jurors shall participate in the verdict which must be unanimous unless the parties otherwise stipulate. Prior to the trial, the magistrate judge, with the agreement of counsel, decided to impanel a jury of 9 in view of the fact that the anticipated time for the trial would be approximately three weeks. As it turned out, the trial lasted four weeks. The magistrate judge's decision to add three jurors was consistent with the local practice of the district to select six jurors plus one for every week the trial was expected to last with those jurors beyond six not being designated as alternates. With none of the original nine jurors being unable to serve throughout the trial, all nine deliberated and returned a unanimous verdict for the respondents.

Petitioner perceived that her burden of convincing nine jurors rather than six imposed a heavy, unfair and unconstitutional burden. However, as properly noted by the Sixth Circuit in its opinion:

> There is nothing fundamentally unfair about having to potentially convince six, seven, eight or nine jurors, when the result of convincing only the first six is not a defense verdict, but a mistrial. Certainly the plaintiff bears the burden of proof as to all jurors. But there is no way of knowing, in a particular case or even on average, whether the last three jurors are going to be more or less sympathetic than the first six. And, as the supreme court has noted, increasing the number of jurors increases the reliability of verdicts,

Citing *Ballew v. Georgia*, 435 U.S. 223, 232-39 (1978).

CONCLUSION

There is no compelling reason for the United States Supreme Court to review the decisions of the two lower courts which in substance held that petitioner received a fair trial.

Respectfully submitted,

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